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No. 73-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JAMES BOB IMPSON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In reply to the Government's Memorandum in Opposition the petitioner would show the Court as follows:

ADMISSIBILITY OF EXTRANEOUS OFFENSE

The Government recites the general rule (with which petitioner agrees) as follows:

> When, as here, there is no question about the accused's presence and opportunity to commit the offense but there may be some question about his knowledge, state of mind, or intent, evidence of other similar crimes is particularly probative because it "is likely to be substantially and directly material to the issue of whether [sic] defendant committed the criminal act."

Memorandum for the United States in Opposition 4-5. The issue presented for review in this case is whether there can be a question of the accused's intent susceptible of illustration by proof of extraneous criminal acts where the accused is placed in possession of recently stolen property, where he does not testify or otherwise attempt to explain his possession of the property, and where the trial court instructs the jury that they may infer intent and guilty knowledge from such unexplained possession.

In addition to the authorities advanced by the petitioner supporting his argument that the admission of the extraneous backhoe transaction was error, the petitioner would respectfully cite the recently published article by Joseph E. Edwards, Admissibility in Federal Conspiracy Prosecution of Evidence of Defendant's Similar Prior Criminal Act, appearing in 20 A.L.R. Fed. 125 (1974). The conclusion reached is identical to that advanced by petitioner:

> While recognizing that a defendant's similar prior criminal acts may be admissible in federal conspiracy prosecutions bearing on the defendant's intent or guilty knowledge, some courts have hastened to add that such evidence is inadmissible where intent or guilty knowledge is not in issue.

Id, at 140, citing Railton v. United States, 127 F.2d 691 (5th Cir. 1942); DeWitt v. United States, 291 F. 995 (6th Cir. 1973), cert. den., 263 U.S. 714 (1923); MacDonald v. United States, 264 F. 733 (1st Cir. 1920). In particular the article notes that in a larceny related case "evidence of a defendant's prior similar criminal act was held inadmissible * * * where there was no question of motive or intent to be illustrated." *Id,* at 173, citing *Railton.*

It should be remembered that the petitioner does not challenge the admissibility of evidence of collateral criminal conduct where there is a genuine issue of intent or guilty knowledge upon which the evidence sheds light. This case presents the very limited situation where, because of the presumption of intent or guilty knowledge accorded the Government by the trial court's charge on the inference to be drawn from unexplained possession of recently stolen property *and* the lack of the accused's explanation of his possession of recently stolen property, there is no genuine issue of intent or guilty knowledge. The cited article supports the petitioner's conclusions (1) that *in this limited situation* the admission of extraneous offenses is both irrelevant and highly prejudicial, and (2) that there is a conflict among the circuits on the precise question presented by the facts of this case.

Contrary to the Government's assertions the petitioner does not urge abandonment of the relevancy test to determine the admissibility of extraneous offenses to show intent or guilty knowledge. The petitioner only urges this Court to say that where the Government is accorded the benefit of an instruction to the jury that intent may be inferred or presumed from unexplained possession of recently stolen property *and* no explanation is attempted by the accused, the use of extraneous offenses to show intent

or guilty knowledge is irrelevant as a matter of law. This conclusion is the logical result of recognizing that the rule authorizing the use of extraneous offenses is not a rule of evidence but is an exception to rule of evidence which is exclusionary in nature. Exceptions to well-recognized rules of evidence must be strictly interpreted and applied.

The Government says that evidence of extraneous offenses to show intent "is admissible so long as the evidence is substantially relevant for some purpose other than to show that the accused committed the crime in question because he is a man of criminal character." *Memorandum for the United States in Opposition* 7. From this the Government concludes that whenever intent is an element of the offense charged extraneous offenses are admissible to establish intent. This reasoning converts the exception into the rule. Pursuant to the Government's theory extraneous offenses would be admissible anytime intent is an element to be proved. Such a conclusion has no support in reason or law because if the use of extraneous offenses to show intent is really an exception to the general rule there are *a fortiorari* cases where intent is an element but in which the exception has no application. Thus the proper test is not (and should not be) whether the evidence is substantially relevant, as the Government urges, because whenever intent or guilty knowledge is an element to be proved, evidence of an extraneous offense is always 'substantially' relevant. Where, as in this case, intent is an element of the crime but the accused does not challenge the Government's direct proof of intent and intent is inferred from possession of recently stolen property, there is no issue joined regarding the accused's intent or guilty knowledge. Only when the issue of intent or guilty knowledge is in some way contested so that the jury must resolve it from evidence, not by a presumption

or inference, is there a basis for invoking the exception authorizing proof of extraneous offenses to show intent.

The cases cited by the petitioner at pp. 6-12 of the petition and those cited in the ALR Fed article support the conclusions (1) that the admission of the extraneous offenses under the particular facts of this case was unnecessary since, as a matter of law, extraneous evidence was not required to discharge the Government's burden of proving intent or guilty knowledge and was highly prejudicial, and (2) that other circuits have agreed with the petitioner's reasoning and conclusions.

SUFFICIENCY OF THE EVIDENCE

The petitioner does not contend that the loader recovered in Texas was not the loader built by Allis Chalmers in Illinois. The petitioner does contend that the evidence is insufficient to show that the specific loader recovered in Texas was ever in the possession of Road Machinery, Inc., of Georgia, thereby obviating the possibility that the specific loader recovered in Texas was stolen from Road Machinery which is the crux of the petitioner's convictions. There is no testimony particularly identifying the loader stolen in Georgia. There is thus no basis for concluding that the loader recovered in Texas was the *same* loader stolen in Georgia. The Government argues that proof by business records of Allis Chalmers of the shipment of the loader from Illinois to Georgia bridges the gap. Such an inference is impermissible because at best the records establish that the loader recovered in Texas was destined for shipment to Georgia. The record simply does not establish that the loader in question ever arrived in Georgia. This void, though it could have easily been filled by

competent evidence at the trial by the Government, exists in the record and cannot now be filled by inference, presumption or intendment.

For the reasons advanced in the petition and herein the petitioner prays that a writ of certiorari issue.

Respectfully submitted,

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